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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1929~~ /930

No. ~~629~~ 53

DAVID BURNET

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1930
CERTIORARI GRANTED APRIL 14, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A [Caption omitted.]

B

C

1 Before United States Board of Tax Appeals

Docket Number 18224

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

versus

COMMISSION OF INTERNAL REVENUE

For Taxpayer: C. R. Dawson and J. C. Murphy, Esqs.
For Commissioner: A. S. Lisenby, Esq.

Docket entries

1926
Jul. 3. Petition received and filed.
Jul. 7. Copy of petition served on Solicitor.
Jul. 7. Notification of receipt mailed taxpayer.
Jul. 13. Motion for 120 days extension to file answer filed by solicitor.
Aug. 4. Granted. Both sides notified.
1927
Jan. 3. Answer filed by G. C.
Jan. 22. Copy of answer served on taxpayer—Gen. Cal.
1928
Jul. 11. Hearing date set 11-28-28.
Aug. 8. Order placing on Cal. of 9-12-28 for hearing at Atlanta, Ga. entered.
Sept. 5. Application for subpœna of A. R. Willingham, Pres. filed by G. C.
Sept. 5. Subpœna issued.
Sept. 12. Hearing had before Mr. Trussell on merits. Submitted on stipulation of facts read into record. Briefs due 11-20-28.
Oct. 15. Transcript of hearing 9-12-28 filed see 18223.
Oct. 25. Order granting extension to 12-15-28 to both parties to file brief—entered.
2 Nov. 1. Brief filed by G. C.
Dec. 13. Brief filed by taxpayer.
1929
Mar. 18. Findings of fact and opinion rendered Mr. Trussell. Judgment will be entered for respondent.
Mar. 22. Decision entered.
Jun. 29. Petition for review by U. S. Cir. Ct. of Appeal (5) with assignments of error filed by taxpayer.

1929

Jun. 29. Præcipe filed.

Jul. 25. Proof of service of petition for review and praecipe filed.

Now, August 7, 1929, the foregoing docket entries certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

[Title omitted.]

Petition

Filed Jul. 3, 1926

The above-named petitioner hereby petitions for a redeter-
3 mination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:E:SM-60D HLJ, dated May 5, 1926, and as a basis of this proceeding alleges as follows:

1. That petitioner is a corporation with principal office at 461 Third Street, Macon, Georgia.

2. The notice of deficiency (a copy of which is attached and marked "Exhibit A" was mailed to the petitioner on May 5, 1926.

3. Bond has been filed with, and approved by, the collector of internal revenue as provided in the revenue act of 1926, section 279 (f) within 10 days from the receipt of said deficiency notice.

4. The taxes in controversy are income and profits taxes for the taxable years ended May 31, 1920 and May 31, 1921, as asserted by the commissioner, but for the calendar years 1920 and 1921 as claimed by the petitioner herein, and are as follows:

Fiscal year ended May 31, 1920	$2,887.95
Fiscal year ended May 31, 1921	276.82

5. The determination of the taxes set forth in the said notice of deficiency is based on the following errors:

(a) The commissioner has incorrectly determined the net income and invested capital of petitioner on the basis of the fiscal years
4 closed May 31, 1920 and May 31, 1921, the determination being incorrect in that original returns were filed on the basis of the calendar years in question, and the accounts having been kept so that income and invested capital could be determined upon the calendar year basis.

(b) The commissioner has erred in that he has attempted to assess, and has assessed, taxes upon the determined net income of this petitioner, although the assessment of same was barred by the reason of the statute of limitations.

(c) The Commissioner of Internal Revenue has incorrectly determined net income in that he has deferred items of credit while

the records of the taxpayer are kept upon a basis of receipts and disbursements, and the original returns were filed on that basis.

6. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The business in which this taxpayer is engaged is that of buying and selling real estate and lending money for interest.

(b) The original tax returns field by the petitioner for the calendar year 1919 were filed on or before March 15, 1920—original tax returns for the calendar year 1920 were filed on or before March 15, 1921—original returns for the calendar year 1921 were filed on or before March 15, 1922.

(c) The net income for the calendar year 1920 was $16,529.82; the net income for the calendar year 1921 was $18,996.14.

(d) The invested capital for the calendar year 1921 is $222,325.89; the invested capital for the calendar year 1921 is $228,806.74.

(e) The records of this petitioner were kept on a basis of
5 receipts and disbursements, and the original returns were filed on the same basis. The records were so kept that net income and invested capital can be redetermined on the basis of calendar year.

(f) The petitioner had not procured permission from the Commissioner of Internal Revenue to change the basis of his accounting period, and was therefore required to file returns on the basis of calendar year, which was the basis of prior returns.

7. The petitioner prays for relief from the deficiency as asserted by the respondent on the following and each of the following particulars:

(a) That the assessment of any additional tax for any part of the 12 months ended December 31, 1919, be declared null and void as being barred by the statute of limitations, same having been assessed after more than 5 years had expired from the date the original returns were filed in the office of the collector of internal revenue, Atlanta, Georgia.

(b) That the net income and invested capital of taxpayer be redetermined on the basis of the calendar years 1920 and 1921 and the tax redetermined in accordance therewith.

(c) That petitioner have such other and further relief as the evidence and the law may warrant and petitioner prays that this board may hear and redetermine the deficiency herein alleged.

Respectfully,

(Signed) C. R. DAWSON,
C. R. DAWSON,
(Signed) J. C. MURPHY,
J. C. MURPHY,
Counsel for Petitioner,
1023 Wynne Claughton Bldg., Atlanta, Georgia.

6 [*Duly sworn to by A. R. Willingham; jurat omitted in printing.*]

Exhibit "A" to petition, Sheet No. 1

TREASURY DEPARTMENT,
Washington, May 5, 1926.

IT:E:SM-60 D
HLJ
WILLINGHAM LOAN & TRUST CO.,
Macon, Georgia.

SIRS: In accordance with the provisions of section 279 (a) of the revenue act of 1926, there has been assessed against you an income and profits tax amounting to $3,164.77 for the taxable years ended May 31, 1921, the details of which are set forth in the attached statement.

7 In accordance with the provisions of section 274 (a) of the same act, you are allowed sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter within which to file a petition with the United States Board of Tax Appeals, contesting in whole or in part the correctness of this determination.

Respectfully,

D. H. BLAIR.
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Enclosure.
Statement.
Form 882.

Statement

Exhibit A, sheet No. 2

IT:E:SM-60D
HLJ

In Re: Willingham Loan & Trust Co., Macon, Georgia.

Fiscal year ended May 31, 1920—Tax assessed, March special 12 list, page 0, line 1	$2,887.95
Fiscal year ended May 31, 1921—Tax assessed, March special 12 list, page 0, line 0	276.82

The total tax liability of $5,820.14 for the fiscal year ended May 31, 1920, and $2,402.29 for the fiscal year ended May 31, 1921, of which you were advised in bureau letter dated October 8, 1925, and January 9, 1926, are therefore sustained.

If you acquiesce in this determination and do not desire to file such petition, you are requested to execute waiver of your right to file a petition with the United States Board of Tax Appeals

8 on the enclosed Form A, and forward it to the Commissioner

of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D-HLJ. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Now, August 7, 1929, the foregoing petition certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[SEAL.]

Before United States Board of Tax Appeals

Answer

Comes now the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, general counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Admits the allegations contained in paragraph 4 of the petition.

5. (a), (b) & (c). Denies that the commissioner erred in the
9 determination of the tax assessed against the petitioner as set out in commissioner's letter dated May 5, 1926, and specifically denies that he erred in the manner set out in subdivisions (a), (b), and (c), of paragraph 5 of the petition.

6. (a) & (b) Admits the allegations contained in subdivisions (a) and (b), of paragraph 6 of the petition.

Re: Willingham Loan & Trust Co.

6. (c), (d), & (e). Denies the allegations contained in subdivisions (c), (d), and (e), of paragraph 6 of the petition.

(f) Admits that the petitioner had not procured permission from the Commissioner of Internal Revenue to change the basis of its accounting period, but denies the remaining allegations contained in subdivision (f), of paragraph 6, and says that it was a consistent practice of the petitioner to close its accounts annually on May 31, and thereby established a fiscal year as of that date.

Denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the taxpayer's petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue.

Of counsel:

DONALD D. SHEPPARD,
Special Attorney, Bureau of Internal Revenue.

DDS/mvb

Now August 7, 1929, the foregoing answer certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

10 Before United States Board of Tax Appeals

Willingham Loan & Trust Co., petitioner v. Commissioner of Internal Revenue, respondent

Findings of fact and opinion. Promulgated March 18, 1929

Fiscal years. The petitioner corporation, having kept its books and closed its accounts annually as of May 31st of each of the years 1920 and 1921, was required by sections 212 (b) and 232 of the revenue act of 1918 and of the same sections of the revenue act of 1921 to make its income and profits tax returns on the basis of such fiscal years.

Statute of limitations. The petitioner corporation, keeping its accounts on a fiscal-year basis, but making returns on a calendar year basis, the applicable statutes of limitations begin to run on the day following the filing of its last calendar year return covering a portion of its fiscal-year period. Paso Robles Mercantile Co., 12 B. T. A. 750, followed. Jeopardy assessments made on the day five or four years respectively from the day on which return was filed are timely made and such assessments having been timely made on March 15, 1926, may be collected at any time within six years from the date of assessment. Revenue Act of 1926, section 278 (d).

J. C. Murphy, Esq., and C. R. Dawson, Esq., for the petitioner.

A. S. Lisenby, Esq., for the respondent.

The deficiencies involved in this action are (1) for a fiscal year ended May 31, 1920, $2,887.95, and (2) for a fiscal year ended May 31, 1921, $276.82. In its original petition the petitioner alleged error on the part of the respondent in computing taxable income and also that the assessment and collection of any deficiencies for the
11 periods named is barred by the statute of limitations. At the trial all issues other than the statute of limitations were waived, and it was agreed that in the event the board should find that the assessment and collection of deficiencies for the periods named were not barred by the statutes of limitations the amounts of the deficiencies were as computed by the respondent.

Findings of fact

The petitioner is a corporation organized under the laws of the State of Georgia on or about June 27, 1909, and has been since that time continuously engaged in the business of real estate and real-estate loans and at some time prior to the year 1918 the petitioner had established the practice of keeping its books of account on the

cash receipts and disbursements basis, of taking off trial balances and trade statements at the end of each month, and of closing and ruling down its books of account annually as of May 31st of each year. The petitioner had no properties requiring the keeping or making of inventories and the monthly trial balances reflected the petitioner's financial condition at the end of each month.

The petitioner had, however, consistently made its income and profits tax returns on the basis of calendar years, preparing the same from its monthly trial balances. Its calendar-year return for the year 1919 was filed with the collector of internal revenue of the district of Georgia on March 13, 1920. Its calendar-year return for the year 1920 was filed with the same collector on March 15, 1921, and its calendar-year return for the year 1921 was filed with the same collector on March 15, 1922. On or about April 1, 1924, the
12 petitioner was called upon by internal revenue officers to make its income and profits tax returns on the basis of its fiscal year ending May 31st, and on that date the petitioner caused to be prepared corporation income and profits tax returns for the fiscal year ended May 31, 1920, and for the fiscal year ended May 31, 1921, and filed the same in the office of the collector of internal revenue for the district of Georgia on April 3, 1924, designating said returns as amended returns.

On March 15, 1926, the respondent made jeopardy assessments of deficiencies for the said fiscal periods ended May 31, 1920, and 1921, and thereafter on May 5, 1926, mailed to the petitioner notice of such assessments in accordance with the provisions of section 279 (a) and (b) of the revenue act of 1926, and on June 28, 1926, petitioner filed with the board its petition for a redetermination of such deficiencies.

Opinion

TRUSSELL:

The record of this action establishes the fact that during all the times herein referred to the petitioner had an established practice of keeping its accounts and closing its books on the basis of a fiscal year ending May 31st of each calendar year, although it had been equally consistent in making income-tax returns on the basis of calendar years. Such calendar-year returns were proper and lawful returns for all the years prior to the year 1918. The revenue act of 1918, however, required corporations to make income-tax returns upon the same basis on which their books of account were kept. Revenue act of 1918, sections 212 (b) and 232. The petitioner should have changed its practice of making returns from the calendar-year basis to its fiscal-year basis when it made its returns for the
13 year 1918, and not having done so, the respondent properly required it to make such change for the periods here under consideration.

For the time included in its fiscal year ended May 31, 1920, the petitioner's calendar year returns were filed on March 13, 1920, and March 15, 1921. For the time included in its fiscal year ended May 31, 1921, the petitioner's calendar year returns were filed on March 15, 1921, and March 15, 1922. In the cases of Paso Robles Mercantile Co., 12 B. T. A. 750, and Lowenstein Bros. Garment Co., 13 B. T. A. 446, the board has held that the statute of limitations began to run upon the date of the filing of the last calendar year return covering the period of time included in the respective fiscal years, and applying the rule of those cases to the instant case the period within which assessments might be made for the fiscal year ended May 31, 1920, would not begin to run until March 16, 1921, and for the period ended May 31, 1921, the statute would not begin to run until March 16, 1922. As to the first period, the five-year period of the statute of limitations (act of 1918, section 250 (d) and act of 1926, section 277 (a) (3) would thus not expire until the close of the day of March 15, 1926, and as to the second fiscal period the four-year period of the statute of limitations (act of 1921, section 250 (d) and act of 1926, section 277 (a) (2) would not expire until the close of the day of March 15, 1926. Elliott National Bank v. Gill, 210 Fed. 933, and the cases of B. R. Weaver, 4 B. T. A. 15; Mrs. D. S. Smith, 4 B. T. A. 385, and Kellogg Commission Co., 6 B. T. A. 771. It thus appears that the jeopardy assessments made on March 15, 1926, were made within the statutory periods of limitation applicable to the several fiscal years involved in this action.

The jeopardy assessments involved in this case were made by the commissioner on March 15, 1926, and pursuant to the provisions of section 279 (a) and (b) of that act. These paragraphs of section 279 provide as follows:

14 (a) If the commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under subdivision (a) of section 274, then the commissioner shall mail a notice under such subdivision within 60 days after the making of the assessment.

The above-quoted provisions of section 279 are in addition to and qualification of section 274 (a) of the same act and we are of the opinion that the making of the jeopardy assessments within the period of the applicable statutes of limitations, the sending of notice of such assessments within 60 days, and the appeal to the board made within 60 days of the said notice gives the board jurisdiction to redetermine the asserted deficiencies, and under the provisions of section 278 (d) of the revenue act of 1926 providing that—

Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior act of Congress has been made (whether before or after the enactment of this act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the commissioner and the taxpayer—

the deficiencies as redetermined by the board may be collected at any time within six years from the date of the timely assessment.

15 Having found that the assessments here in question were made within the applicable periods of the statutes of limitations and that the board has jurisdiction to redetermine such deficiencies and the parties having agreed that the computation of such deficiencies has been correctly made, we must conclude that the deficiencies are as follows: for the fiscal year ended May 31, 1920, $2,887.95 and for the year ended May 31, 1921, $276.82.

Judgment will be entered for the respondent.

Now, August 7, 1929, the foregoing findings of fact and opinion certified from the record as a true copy.

[SEAL.] B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

Before United States Board of Tax Appeals

Decision

Pursuant to the board's findings of fact and opinion, promulgated March 18, 1929, it is

Ordered and decided: That there are deficiencies of $2,887.95 and $276.82 for the fiscal years ended May 31, 1920, and May 31, 1921, respectively.

Entered Mar. 22, 1929.

(Signed) S. L. TRUSSELL.
Member, United States Board of Tax Appeals.

Now, August 7, 1929, the foregoing decision certified from the record as a true copy.

[SEAL.] B. D. GAMBLE.
Clerk, U. S. Board of Tax Appeals.

MVW

16 Before United States Board of Tax Appeals

Petition for review filed June 29, 1929

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioner respectfully shows:

1. Your petitioner is a corporation organized under the laws of the State of Georgia with principal office and place of business at Macon, Georgia.

2. By this proceeding petitioner is seeking a review by the United States Circuit Court of Appeals for the Fifth Circuit of a decision of the United States Board of Tax Appeals entered March 18, 1929, and order thereon redetermining deficiency in corporation income and profits taxes for the fiscal years ended May 31, 1920 and May 31, 1921 in the sums of $2,887.96 and $276.83, respectively.

3. The petitioner contended before the Board of Tax Appeals that more than five years had elapsed from the date the original legal returns were filed for the taxable year 1920 and more than four years for the taxable year 1921 and that therefore the assessment and the collection of the deficiencies asserted was barred by the statutory period of limitations properly applicable thereto. This the respondent denied.

4. The errors committed by the Board of Tax Appeals upon which petitioner relies as the basis of this proceeding are as follows:

(a) The board erred in holding that the assessment of the deficiencies was not barred by the statutory period of limitations properly applicable thereto.

(b) The board erred in failing to hold that the collection of the deficiencies is barred by the statutory period of limitation properly applicable thereto.

17 (c) Under the findings of fact the board erred in holding that petitioner is legally required to file its returns for the period under review upon the basis of the fiscal year, and that fiscal year returns were properly required.

(d) The board erred in holding that the statutory period of limitations upon assessment for the fiscal year 1920 did not begin to run until March 16, 1921, and for the fiscal year 1921 until March 16, 1922, and that the limitation periods did not expire in each year until the close of the day March 15, 1926.

(e) The board erred in affirming the determination of the commissioner that there is a deficiency in tax for the fiscal year 1920 in the sum of $2,887.96 and for the fiscal year 1921 in the sum of $276.83.

Wherefore, your petitioner prays that the United Circuit Court of Appeals for the Fifth Circuit review the action of the United States Board of Tax Appeals, reverse the decision thereof and direct that proper entry and order thereon be made by said board in favor of petitioner, and specifically determining that there is no deficiency

in corporation income and profits taxes, and your petitioner prays for such other and further relief as may to the court appear proper in the premises.

J. C. MURPHY,
Attorney for Petitioner.

[*Duly sworn to by J. C. Murphy; jurat omitted in printing.*]

18 Before United States Board of Tax Appeals

Notice of filing petition for review

To the Commissioner of Internal Revenue:

Your [you] are notified that petition for review of the decision and order in the above-stated case is this day being filed to the United States Circuit Court of Appeals, copy of said petition being hereto attached. No error is assigned in the admission or rejection of evidence and therefore no statement of evidence submitted to the board will be prepared by petitioner.

J. C. MURPHY,
Attorney for Petitioner.

Before United States Board of Tax Appeals

Acknowledgment of service

Due and legal service of the following-described documents in the above-stated case is acknowledged; other and further service is waived:

Petition for review by the United States Circuit Court of Appeals for the Fifth Circuit.

Notice of filing petition for review.

Præcipe.

[SEAL.]

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue and
Attorney for Respondent.

This 29th day of June, 1929.

Now, August 7, 1929, the foregoing petition for review, notice of filing, and acknowledgment of service thereof certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

19 Before United States Board of Tax Appeals

Præcipe for transcript of record

To the Clerk, U. S. Board of Tax Appeals:

You will please prepare within sixty days from the date of the filing of the petition for review in the above-entitled cause and transmit to the clerk of the United States Circuit Court of Appeals for the Fifth Circuit, certified copies of the following documents:

1. The docket entries of the proceeding before the board.
2. Petition of Willingham Loan & Trust Company.
3. Answer of Commissioner of Internal Revenue.
4. Findings of fact, opinion, and decision of the board entered March 18, 1929.
5. Order of redetermination by Board of Tax Appeals.
6. Petition for review by the United Circuit Court of Appeals for the Fifth Circuit.
7. Notice of filing petition for review.
8. Acknowledgment of service.
9. This præcipe.

20 The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United Circuit Court of Appeals for the Fifth Circuit.

This June 26, 1929.

J. C. MURPHY,
Attorney for Petitioner,
427 Hurt Bldg., Atlanta, Ga.

Now, August 7, 1929, the foregoing præcipe certified from the record as a true copy.

[SEAL.] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

21 [Minute entry of argument and submission, Oct. 8, 1929, omitted in printing.]

22 In United States Circuit Court of Appeals for the Fifth Circuit

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Motion to substitute Robert H. Lucas, present Commissioner of Internal Revenue, for David H. Blair, resigned, filed October 8, 1929

Comes now the Attorney General by Helen R. Carloss, special assistant to the Attorney General, and suggesting to the court the

resignation of David H. Blair as Commissioner of Internal Revenue, moves that Robert H. Lucas, present Commissioner of Internal Revenue be substituted as party respondent in the above entitled cause.

(Signed) HELEN R. CARLOSS,
Special Assistant to the Attorney General.

23 In the United States Circuit Court of Appeals

[Title omitted.]

Order substituting Robert H. Lucas as party respondent, October 8, 1929

On consideration of the motion of the Attorney General, through Miss Helen Carloss, special assistant to the Attorney General, suggesting the resignation of David H. Blair, as Commissioner of Internal Revenue, and moving that Robert H. Lucas, present Commissioner of Internal Revenue be substituted as party respondent in the above entitled cause:

It is ordered that the said Robert H. Lucas, Commissioner of Internal Revenue, be substituted as party respondent in the above entitled cause.

24 In United States Circuit Court of Appeals, Fifth Circuit

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY, PETITIONER

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the United States Board of Tax Appeals (District of Georgia)

J. C. Murphy for petitioner.

Sewall Key, Harvey R. Gamble, Helen R. Carloss, Spec. Assts. to the Attorney General, C. M. Charest, Gen. Counsel, Bureau of Int. Rev., John M. C. Hudson, Spec. Atty., Bureau of Int. Rev., for respondent.

Before WALKER, BRYAN, and FOSTER, *Circuit Judges*

Opinion filed November 22, 1929

FOSTER, *Circuit Judge:*

In this case it appears that petitioner kept its books on a monthly basis, taking off trial balances and dividing profits at the end of

each month, and closed the books on May 31st annually. However, they filed returns for income and profit taxes on the annual basis for the years 1919, 1920, and 1921, and prior years, using the
25 monthly trial balances for that purpose. The Commissioner of Internal Revenue required returns to be made on the fiscal year basis. This was done, petitioner filing returns on the basis of its fiscal years ending May 31st, 1920 and 1921. On March 15th, 1926, the commissioner made jeopardy assessments of deficiencies for those two years. Contending that the assessments were made after the statute of limitations had run, petitioner sought relief from the Board of Tax Appeals.

The board held that the statute began to run from the date of the filing of the last calendar year return covering the period of time included in the respective fiscal years, which was March 15th, 1921 for the year 1920, and March 15th, 1922 for the year 1921. We concur in this ruling. On the respective dates of the filing of the returns on the annual basis the commissioner had before him accurate data upon which to consider deficiencies and make assessments based on the fiscal years. This is not inconsistent with our ruling in Florsheim Bros. Dry Goods Co., Ltd., vs. United States, 29 F. (2d) 895, as in that case the taxpayer had first filed a tentative return in which the amount of taxes was estimated and the commissioner did no have sufficient data before him upon which to make an assessment until the complete return was filed.

However, the board held that the statutes of limitation applicable to the assessment, Rev. Act of 1918, 250 D; Rev. Act of 1921, 250 D; and Rev. Act of 1926, 277 (A) (2) and (3), would not begin to run until after the date of filing so that the commissioner had all of March 15th, 1926, in which to make the assessments. This,
26 we think, was error. In each of the statutes applicable the language with regard to assessments in substance is that deficiencies shall be determined and assessed by the commissioner within five or four years respectively after the return was due or was made. Taxing statutes are to be construed in favor of the taxpayer. The statutes should not be held to mean that limitation begins to run after the "day" or "date" upon which the return was due or was made. In this respect we have heretofore held, in the case of New York Life Ins. Co. vs. Bullock, 26 F. (2d) 666, that the rule with regard to computation of time is that, where it is to be made from a specific day, the first day is excluded, but where it runs from an event, the first day is to be included. We see no occasion to depart from the conclusion reached in the above cited case. Clearly, prescription ran from the event of filing and not from the day of filing. The assessments made on the 15th day of March, 1926, were one day too late.

The *The* petition is granted and the judgment is *Reversed*.

27 In United States Circuit Court of Appeals

No. 5690

WILLINGHAM LOAN AND TRUST COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

Judgment, Nov. 22, 1929

This cause came on to be heard on the petition of Willingham Loan and Trust Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that said petition be, and the same is hereby, granted, and that the judgment of the said United States Board of Tax Appeals be, and it is hereby, reversed.

28 In United States Circuit Court of Appeals

Motion for order staying mandate, filed December 16, 1929

Now comes the Commissioner of Internal Revenue, the respondent herein, by his attorney, C. M. Charest, general counsel, Bureau of Internal Revenue, and moves the court to enter an order herein staying its mandate for a period of three months from the date of the entry of the judgment herewith.

In support of this motion the said Commissioner of Internal Revenue respectfully shows to the court that he is considering the advisability of filing in the Supreme Court within the three months' period provided by statute in that respect a petition for certiorari in this cause; that it is highly probable that such petition for certiorari will be filed; and that he believes it undesirable under such circumstances to have the mandate of this court issue in accordance with the general rules of this court.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

29 In United States Circuit Court of Appeals

Order staying mandate, Dec. 16, 1929

On consideration of the application of the respondent in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable respondent to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of three months from November 22nd,

1929, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 16th day of December, 1929.

(Signed) R. W. WALKER,
United States Circuit Judge.

30 [Clerk's certificate to foregoing transcript omitted in printing.]

31 Supreme Court of the United States

Order allowing certiorari filed April 14, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

32 (Indorsement on cover:) File No. 34814. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 683. Robert H. Lucas, Commissioner of Internal Revenue, Petitioner, vs. Willingham Loan and Trust Company. Petition for writ of certiorari and exhibit thereto. Filed February 21, 1930. File No. 34814.

U. S. GOVERNMENT PRINTING OFFICE: 1930

FILE COPY

Supreme Court, U. S.
FILED
FEB 21 1930
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 53

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General on behalf of the Commissioner of Internal Revenue prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above cause on November 22, 1929, reversing the decision of the United States Board of Tax Appeals. (R. 15.)

STATEMENT

The question in the case is whether the assessments on March 15, 1926, of additional income and profits taxes for the fiscal years ended May 31, 1920,

and May 31, 1921, were made within five years and four years, respectively, from the filing of the returns on March 15, 1921, and March 15, 1922, respectively.

The pertinent facts as found by the Board of Tax Appeals are as follows (R. 11, 12):

The taxpayer closed its books of account annually as of May 31, but made its income and profits tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner held that the returns should not be filed upon the calendar year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Commissioner required the taxpayer to file amended returns upon the fiscal year basis for the years ended May 31, 1920, and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for said fiscal years 1920 and 1921. The taxpayer appealed to the Board of Tax Appeals and then to the Circuit Court of Appeals for the Fifth Circuit. Both held that the period of limitations did not begin to run until the filing of the last calendar year return embracing a portion of the particular fiscal year. But the Circuit Court of Appeals held that in computing the period of limitation the day of the filing of the return should be included, and reversed on the

ground that the assessment was made one day late because in computing the period the Commissioner had excluded the day of the filing of the return.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that in computing the period of limitation provided in Section 250 (d) of the Revenue Acts of 1918 and 1921 and Section 277 (a) (2) (3) of the Revenue Act of 1926, within which assessment of taxes must be made, the day of the filing of the tax return should be included.

REASONS FOR GRANTING THE WRIT

(1) The decision of the Circuit Court of Appeals is contrary to the decisions of this Court in *Sheets* v. *Selden's Lessee,* 2 Wall. 177; *Dutcher* v. *Wright,* 94 U. S. 553; and *Smith* v. *Gale,* 137 U. S. 577, in which cases this Court has laid down the principle that in computing periods of time for the performance of an act, whether started from an event or from a specified day, the day of the event or the day named shall be excluded from the computation.

(2) The decision of the Circuit Court of Appeals is also in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600, the Circuit Court of Appeals for the Second Circuit in *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226, and the Circuit Court of Appeals for the Seventh Circuit in *In re Hamilton,* 29 F. (2d) 281.

(3) The question is one of importance in administering the tax laws. A large number of assessments involving large sums of money have been made by the Commissioner on the last day of the period allowed by the various Revenue Acts for the assessment of taxes, upon the assumption that the day of filing a return was excluded from the computation of the period and that the assessments were on time. Under the decision below all of these assessments would be barred.

(4) If the decision of the Circuit Court of Appeals is allowed to stand, the same rule would seem to apply to the computation of the period of time allowed by the statutes within which the Commissioner is authorized to allow credits and refunds of overassessments of taxes. (Section 252 of the Revenue Acts of 1918 and 1921, Section 281 of the Revenue Act of 1924, and Section 284 of the Revenue Act of 1926.) As a large number of credits and refunds have been allowed by the Commissioner on the last day of the period allowed by the statute, excluding the day of payment, it would follow, if the court in the instant case is correct, that large sums of money have been and are being erroneously credited or refunded by the Government.

(5) Numerous appeals to the Board of Tax Appeals involving large amounts in taxes have been filed by taxpayers under the provisions of Section 274 (a) of the Revenue Acts of 1924 and 1926 on the sixtieth day after the mailing by the Commissioner of notice of deficiency, upon the assumption

that the day of mailing the notice is excluded from the computation of the sixty-day period allowed by the statute for such an appeal. If the opinion of the Circuit Court of Appeals is allowed to stand, it would seem that the same rule of computation would apply to Section 274 (a), *supra,* and, as a consequence, the Board of Tax Appeals would be without jurisdiction to entertain a very large number of appeals that are now pending.

(6) The present decision leaves in confusion the proper rule to be applied in computing the periods of limitations provided in the various sections above referred to, and a decision by this Court seems necessary to enable the Treasury Department to properly administer the revenue laws.

Wherefore, it is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Attorney General.

FEBRUARY, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals is reported in 36 F. (2d) 49.

The findings of fact and opinion of the Board of Tax Appeals (R. 11–15), are reported in 15 B. T. A. 931.

JURISDICTION

The order of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered on November 22, 1929. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the statute requires that the assessment of taxes for the fiscal year 1920 shall be made within five years from the time the return was due or made, and for the fiscal year 1921 within four years from the filing of the return, and the returns were filed on March 15, 1921, and March 15, 1922, respectively, are assessments on March 15, 1926, for taxes for each fiscal year made within the respective periods of five and four years prescribed?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such

taxes due under this Act or under prior income, excess profits, or war profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

STATEMENT

A statement of the facts and of the error relied upon will be found in the petition.

ARGUMENT

The pertinent provisions of the three statutes of limitation here involved are in almost exactly the same language and provide that the amount of tax due under any return shall be determined and assessed by the Commissioner within a specified number of years after the return was filed. The Circuit Court of Appeals for the Fifth Circuit in this case has interpreted that language to mean that in computing the period the day of the filing of the return must be included. Here a return to which the five-year statute applied was filed March 15, 1921, and a return to which the four-year statute applied was filed March 15, 1922, and the assessment as to both returns was made March 15, 1926. The court held that the assessment was one day late. In doing so it said it was following its own decision in *New York Life Ins. Co.* v. *Bullock,* 26 F. (2d) 666, where it had approved a rule with regard to computation of time, that, where it is to be made from a specified day, the first day is excluded, but where it runs from an event the first day is to be included. This distinction was applied in some of the earlier cases but it has been rejected by the later authorities as unsound. The general rule now favored and well established in most, if not all, jurisdictions, is that in computing the period of time, whether started from an event or a specified day, the first day or *terminus a quo* is excluded. *Sheets* v. *Selden's Lessee,* 2 Wall. 177; *Dutcher* v.

Wright, 94 U. S. 553; *Smith* v. *Gale,* 137 U. S. 577; *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600; *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226; *Bennis* v. *Leonard,* 118 Mass. 502; *Seward* v. *Hayden,* 150 Mass. 158; *McCulloch* v. *Hopper,* 47 N. J. L. 189; *Cornell* v. *Moulton,* 3 Denio (N. Y.) 12.

In *Sheets* v. *Selden's Lessee, supra,* this Court held that under a lease requiring payment of rental within one month from the due date thereof the month period for the payment of installment due on May 1st expired on June 1st next following. It was there said (p. 190):

> The rent becoming due on the first day of May, the one month from that time within which the payment was required to be made to prevent a forfeiture, expired on the first day of June following. In the computation of the time, the day upon which the rent became due was to be excluded. The general current of the modern authorities on the interpretation of contracts, and also statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded

> as an entirety or a point of time; and so be excluded from the computation."

To the same effect see *Smith* v. *Gale, supra.*

In *Dutcher* v. *Wright, supra,* this Court applied the same rule of computation to the construction of the Bankruptcy Act. Although that Act prescribed a rule for computing periods of time thereunder, this Court did not predicate its decision solely upon the statutory rule, but referred to and applied the general rule under which the *terminus a quo* is excluded.

The Circuit Court of Appeals for the First, Second, and Seventh Circuits have likewise recognized this general rule and have ignored the distinction made by the Circuit Court of Appeals in the instant case. *Siegelschiffer* v. *Penn Mut. Life Ins. Co.,* 248 Fed. 226; *In re Hamilton,* 29 F. (2d) 281; *Eliot Nat. Bank* v. *Gill,* 218 Fed. 600.

Such cases as *Taylor* v. *Brown,* 147 U. S. 640; *Griffith v. Bogert,* 18 How. 158; *Arnold* v. *United States,* 9 Cranch 103; and *Board of Commissioners* v. *Vandriss,* 115 Fed. 866, are not inconsistent and do not establish any different rule. In these cases it was held that the manifest purpose and clear intent of the statutes was that the first day or *terminus a quo* should be included in the computation of the period. These decisions were not founded upon any such distinction as the Circuit Court of Appeals adopts in this case. There is nothing in the present case to justify the appli-

cation of the exception to the general rule which was applied in these cases. The sections of the Revenue Acts involved here are statutes of limitation and nothing therein indicates a Congressional intent to vary the general rule of computing periods of time. On the contrary, it seems clear that Congress intended to allow the Commissioner the full period specified within which to perform his official duty of assessing taxes and that intent would be frustrated under the rule for computing time which the Circuit Court of Appeals adopts in this case.

Moreover, the Circuit Court of Appeals has apparently misconceived the character of the statutes involved in this case, in referring to the rule of construction that taxing statutes are to be construed liberally in favor of the taxpayer. The sections of the laws in question, although a part of Revenue Acts imposing taxes, are statutes of limitation and are subject to all the rules of construction governing such statutes. It is well settled that statutes imposing limitations against the Government are strictly construed in favor of the Government (*Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346; *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456; *United States* v. *Whited & Wheless*, 246 U. S. 552; *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120), and the Circuit Court of Appeals erred in not recognizing and giving effect to this well and long established principle.

CONCLUSION

Because of the conflict of decisions and the resulting difficulty in a proper administration of the Revenue Acts, it is submitted that this petition should be granted.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
SEWALL KEY,
HARVEY R. GAMBLE,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
JOHN M. HUDSON,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

FEBRUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE : 1930

FILE COPY

Supreme Court
U. S.
DEC 26 19
CHARLES ELMORE

No. 53

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLINGHAM LOAN AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 53

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

WILLINGHAM LOAN AND TRUST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 6–9) is reported in 15 B. T. A. 931. The opinion of the Circuit Court of Appeals (R. 13–14) is reported in 36 F. (2d) 49.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 22, 1929. (R. 15.) Petition for certiorari was filed February 21, 1930, and certiorari was granted on April 14, 1930. (R.

16.) (281 U. S. 710.) The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Under the statutes requiring that the assessment of taxes for the fiscal year 1920 shall be made within five years from the time the return was due or made, and for the fiscal year 1921 within four years from the filing of the return, where the returns were filed on March 15, 1921, and March 15, 1922, respectively, are assessments on March 15, 1926, for taxes for each fiscal year made within the respective periods of five and four years prescribed?

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, * * *.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable

years or under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58 (U. S. C. App., Title 26, Sec. 1057):

SEC. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 * * * shall be assessed within four years after the return was filed, * * *.

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, * * *.

STATEMENT

The taxpayer closed its books of account annually as of May 31st, but made its income and profits-tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the Collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner ruled that the returns should not have been filed upon the calendar-year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Com-

missioner required the taxpayer to file amended returns upon the fiscal-year basis for the years ended May 31, 1920, and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for the fiscal years ended in 1920 and 1921. (R. 6–7.)

The taxpayer filed a petition for the redetermination of the deficiency with the Board of Tax Ap- (R. 2), which rendered judgment for the Commissioner (R. 9). The taxpayer then appealed to the Circuit Court of Appeals (R. 10), which reversed the judgment of the Board on the ground that the assessment was made one day late because in computing the period of limitation the Commissioner had excluded the day of the filing of the return (R. 13–14).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that, in computing the period of limitation provided in Sections 250 (d) of the Revenue Acts of 1918 and 1921 and Section 277 (a) (2) (3) of the Revenue Act of 1926 within which assessment of taxes must be made, the day of the filing of the tax return should be included.

SUMMARY OF ARGUMENT

The pertinent provisions of the three statutes of limitation involved all provide that the amount of tax due under any return shall be determined and assessed within a specified number of years after

the return was filed (or was made). The sole question is whether, in computing the period of limitations, the day upon which the return was filed should be excluded or included. The decision of the Circuit Court of Appeals, which holds that the day upon which the return was filed should be included, because the period ran from an event and not from a specified day, is in conflict with the decisions of this Court and most of the decisions of other courts construing similar statutes. The distinction made by the court below in the instant case between periods running from an event and from a specific day was applied in some of the earlier cases but it has been rejected by the later authorities as unsound. If the statutes in question indicated that the first day should be included, then the case would come within the exception to the rule and the intention of the Congress should be given effect. But the statutes do not indicate such an intention.

ARGUMENT

Sections 250 (d) of the Revenue Acts of 1918 and 1921, *supra,* and Section 277 (a) (3) of the Revenue Act of 1926, *supra,* are substantially alike and provide that the amount of tax due under any return shall be determined and assessed within a specified number of years after the return was filed or was made. It appears that on March 15, 1921, the taxpayer filed a return to which the five-year statute applied; and, on March 15, 1922, a return to which the four-year statute applied. The as-

sessments as to both returns were made by the Commissioner on March 15, 1926. (R. 7.) The sole question is whether or not the assessments were made within the statutory period.

The Circuit Court of Appeals held that the assessments made on March 15, 1926 were one day late, because the statute ran from the *event of filing* and not from the *day of filing*. The court relied upon its decision in *New York Life Ins. Co.* v. *Bullock*, 26 F. (2d) 666, in which it held that the rule with regard to computation of time is that where it is to be made from a specific day the first day is excluded, but where it runs from an event the first day is to be included.

The decision of the Circuit Court of Appeals in the instant case is in conflict with the decisions of other courts construing similar statutes, such as *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Dutcher* v. *Wright*, 94 U. S. 553; *Smith* v. *Gale*, 137 U. S. 577; *Hicks* v. *National Life Ins. Co.* (C. C. A. 2d), 60 Fed. 690, 693; *Supreme Council American Legion of Honor* v. *Gootee* (C. C. A. 4th), 89 Fed. 941, 945; *Eliot Nat. Bank* v. *Gill* (C. C. A. 1st), 218 Fed. 600, affirming 210 Fed. 933; *Siegelschiffer* v. *Penn. Mut. Life Ins. Co.* (C. C. A. 2d), 248 Fed. 226, 228; *In re Hamilton* (C. C. A. 7th), 29 F. (2d) 281; *Chambers* v. *Lucas* (Ct. App. D. C.), 41 F. (2d) 299; *Bell* v. *West* (C. C. A. 4th) decided October 21, 1930, not yet reported; *In re Anttonen* (D. C. Ore.), 293 Fed. 473; *United States* v. *Senecal* (D. C.

Mass.), 36 F. (2d) 388, 389; *Bemis* v. *Leonard,* 118 Mass. 502; *Seward* v. *Hayden,* 150 Mass. 158; *Laine* v. *Aarnio,* 265 Mass. 374; *McCulloch* v. *Hopper,* 47 N. J. (Law) 189; *Warshaw* v. *De Mayo,* 150 Atl. 214 (Sup. Ct., N. J.); *Cornell* v. *Moulton,* 3 Denio (N. Y.) 12; *Stiegler* v. *Eureka Life Ins. Co.,* 146 Md. 629, 656; *Menges* v. *Frick,* 73 Pa. 137; *Hook* v. *Bixby,* 13 Kan. 164.

In the leading case of *Sheets* v. *Selden's Lessee, supra,* this Court said (p. 190):

> The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated and to include the last day of the specified period. "When the period allowed for doing an act," says Mr. Chief Justice Bronson, "is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so be excluded from the computation."

In *Taylor* v. *Brown,* 147 U. S. 640, this Court reaffirmed the rule laid down in *Sheets* v. *Selden's Lessee, supra,* which excludes the *terminus a quo,* but held that it was not so absolute as to prevent the inclusion of such *terminus* when necessary to give effect to an obvious intent. See also *Griffith*

v. *Boyert,* 18 How. 158; *Arnold* v. *United States,* 9 Cranch 103; *Owensboro* v. *Owensboro Water Works Co.,* 243 U. S. 166, 171; and *Board of Com'rs* v. *Vandriss* (C. C. A. 8th), 115 Fed. 866. The instant case does not come within this exception because the statutes involved do not specifically indicate that the first day or *terminus a quo* should be included in the computation of the period.

Attention is also called to the fact that an anomalous situation will result unless this case is governed by the rule adopted by this Court in the *Sheets case, supra,* to the effect that in computing periods of time the *terminus a quo,* whether it be a day named or the occurrence of an event, shall be excluded. Sections 250 (d) of the Revenue Acts of 1918 and 1921 prescribe that the tax shall be assessed within five years (or four years, as the case may be) after the return was filed (or was due or was made). The next succeeding clause or sentence provides that no suit or proceeding for the collection of the tax shall be begun "after the expiration of five years after the date when such return was filed" (or was due or was made). This clearly means a period of five full years, the first day of which is the day next after that on which the return was filed. If the decision of the Circuit Court of Appeals in the instant case is sound and a distinction is recognized in the rule of computation of periods of time started from an event and

those started from a specified day, then the Revenue Acts define two different periods of limitation within which the Commissioner might proceed with the enforcement of the same tax liability. Under the rule adopted by the court below, the assessments of the taxes involved in the instant case are barred by the statute of limitations, but a suit or proceeding for collection instituted on the day on which the assessments were here made would not be barred. If the court below has correctly construed the applicable provisions of the Revenue Acts, there was still time for instituting a suit for the collection of taxes although the time for assessment was barred. Certainly Congress could not have intended any such anomalous result, and we submit that the language of the statutes in question does not require any such construction.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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No. 53

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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No. 683

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLINGHAM LOAN AND TRUST COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

I.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals is reported in 36 F. (2d) 49.

The findings of fact and opinion of the Board of Tax Appeals (R. 11-15), are reported in 15 B. T. A. 931.

II.

JURISDICTION

The order of the Circuit Court of Appeals reversing the decision of the Board of Tax Appeals was entered on November 22, 1929. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III.

QUESTION PRESENTED

The question presented is whether or not the day on which a federal income tax return is filed is to be counted in computing the time within which assessment may be made of a deficiency in tax. The decision below holds that the day on which the return is filed must be included in the computation of such time. The decision of the Board of Tax Appeals reviewed by the court below holds that limitation time begins to run at midnight after the return was filed.

IV.

STATEMENT

The pertinent facts as found by the Board of Tax Appeals are as follows (R. 11, 12):

The taxpayer closed its books of account annually as of May 31, but made its income and profits tax returns on the basis of the calendar year. The return for the calendar year 1919 was filed with the

collector on March 13, 1920; the return for 1920 was filed on March 15, 1921; and the return for 1921 was filed on March 15, 1922. Upon examination and audit the Commissioner held that the returns should not be filed upon the calendar year basis but upon the basis which the taxpayer used in keeping its books. Accordingly in 1924 the Commissioner required the taxpayer to file amended returns upon the fiscal year basis for the years ended May 31, 1920 and May 31, 1921. On March 15, 1926, the Commissioner made jeopardy assessments of additional income and profits taxes for said fiscal years 1920 and 1921. The taxpayer appealed to the Board of Tax Appeals and then to the Circuit Court of Appeals for the Fifth Circuit. Both held that the period of limitations did not begin to run until the filing of the last calendar year return embracing a portion of the particular fiscal year. But the Circuit Court of Appeals held that in computing the period of limitation the day of the filing of the return should be included, and reversed on the ground that the assessment was made one day late because in computing the period the Commissioner had excluded the day of the filing of the return.

V.
SUMMARY OF ARGUMENT

1. This Court has not construed the particular statute in question and therefore the decision below is not contrary to the decisions of this Court.

2. The decision below is thought not to be in conflict with the decisions of other Circuit Courts of Appeals for the reason that no other Circuit Court of Appeals has construed the particular statute.

3. To construe the statute otherwise, it is thought, would enlarge the taxing statute and therefore be clearly erroneous.

4. Doubt in limitation sections of the taxing statute, it is believed, should be resolved in favor of the taxpayer and against the Government.

5. The decision of the court below holding that the day on which the tax return was filed should be included in the computation of the time within which an assessment might have been made is supported in principle by numerous decisions.

VI.

ARGUMENT

1. Counsel for the petitioner has submitted as reasons for granting the writ that the decision below is contrary to the decisions of this Court in certain cited cases, in which cases this Court has construed particular statutes and laid down certain principles in computing periods of time for the performance of an act.

It is believed that the decision below is not contrary to the decisions of this Court in the cited cases for the following reasons:

(a) The statute construed by the court below has not been considered by this Court in any of these cases.

(b) The decisions cited by counsel for the petitioner relate specifically to other time statutes and none of them relate to limitation sections of a taxing statute of the United States.

(c) It is thought that the rule to be applied in the computation of limitation periods, whether it runs from the day of date or the happening of an event upon a date, must depend upon the particular words of the phrases construed. This proposition is believed to be sustained by the following quotation from one of the decisions cited by petitioner:

> "Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled. Still it must be admitted that it is difficult, if not impossible, to deduce from the reported decisions any rule which will apply in all cases * * *"

Dutcher v. Wright, 94 U. S. 553.

2. The particular question presented in this case has not been decided by any Circuit Court of Appeals other than the court below, for the reason that no other Circuit Court of Appeals has been called upon to decide the question as it relates to the particular statutes fixing the time within which federal income taxes, for any years, may be assessed by the Commissioner of Internal Revenue. The question, as it relates to other time statutes, has been decided by other Circuit Courts of Appeals, but it is believed that such decisions do not constitute a conflict such as is contemplated as a basis for review by this Court.

3. The statutes involved, fixing the time within which the assessments in controversy might have legally been made, are a part of the same statute creating the liability for the tax, and as such it is

thought constitute a limitation upon the right to assess the tax at all. With respect to this section 250 (d) Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083)

> "* * * the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, * * *."

The substance of this limitation has been brought forward into each of the succeeding taxing statutes, the only change being made by subsequent statutes was to change "was due or was made" to "was filed". It is thought that to eliminate from the computation of the time within which the assessment in controversy might have been made would necessarily result in the enlargement of that time and therefore the enlargement of a taxing statute.

The protection to the Government by fixing the period of five years within which to assess deficiencies was fully attained, and no reason is perceived why any more than that time should be assumed to have been within the legislative contemplation.

4. Counsel for the petitioner submits that doubt in connection with the particular statute under consideration should be resolved in favor of the Government rather than in favor of the taxpayer and against the Government; and has cited in support of that contention certain case including Bowers vs. New York & Albany Lighterage Company, 273 U. S. 346, 47 Sup. Ct. Rep. 389.

It is thought that counsel for the petitioner has

misinterpreted the decision of this Court in Bowers vs. New York & Albany Lighterage Company. In that case this Court said:

> "He maintains that any ambiguity in the clause under consideration must be resolved in his favor. Undoubtedly the United States will not be held barred by a general statute of limitation unless, upon a strict construction in its favor, the United States and the claim sought to be enforced fairly may be held to be within the terms and purpose of the statute. That rule rests upon the general principle of policy applicaple to all governments that the public interest should not be prejudiced by the default or negligence of public officers. The limitation applies to petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."

It is thought that this Court in the cited case definitely laid down the rule that where a limitation section is a part of a taxing statute, the rule to be applied in connection with such limitation section is the rule that such laws are to be interpreted liberally in favor of the taxpayers, notwithstanding the fact that the section is in the nature of a limitation statute against the United States.

VII.

5. The decision below holds that the jeopardy assessment made on March 15th, 1926, upon returns filed for 1920 on March 15th, 1921, and for 1921 on March 15th, 1922, was too late, the statute requiring assessment within five years after the return for 1920

was filed and within four years after the return for 1921 was filed, for the reason that the day on which the return filed should be included in the computation of the limitation period. The Board of Tax Appeals, by that decision reviewed, had held that the assessment was timely for the reason that the limitation period fixed by the statutes did not begin to run until midnight after the returns were filed.

In Arnold vs. United States, 9 Crench, 119, this Court said:

> "* * * And it is a general rule that where the computation is to be made from an act done, the day on which the act is done is to be included."
>
> "From the making is inclusive and 'from the day of making' is exclusive."
>
> Clayton's Case, 5 Coke Eng. 1.

There are numerous decisions of courts of lower jurisdiction sustaining the principle that as a general rule, in absence of legislation controlling the subject, and in the absence of any established rule for the interpretation of such statutes as to liberal or strict construction, the day on which the act is done is to be included. These are not cited as it is thought that such decisions would be persuasive only, and therefore, improperly cited in this brief.

CONCLUSION

It is respectfully submitted that the petition should be denied.

J. C. MURPHY,
Attorney for Respondent,
427 Hurt Building,
Atlanta, Georgia.

March, 1930.

APPENDIX A

STATUTES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083:

> Sec. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

> Sec. 250. (d) The amount of income, excess profits, or war profits taxes due under any return made under this Act for the taxable year 1921 * * * shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess profits, or war profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or

proceeding for collection of any such taxes due under this Act or under prior income, excess profits, or war profits tax Acts * * * shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act * * *.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

Sec. 277. (a) Except as provided in section 278—

* * * * *

(2) The amount of income, excess profits, and war profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

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Supreme Court of the United States,

OCTOBER TERM, 1930.

NO. 53.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

against

WILLINGHAM LOAN AND TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

J. C. MURPHY,
JOSEPH M. HARTFIELD,
Counsel for Respondent.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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*Footnote

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 53.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

AGAINST

WILLINGHAM LOAN AND TRUST COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Board of Tax Appeals (R. 6-9) is reported in 15 B. T. A. 931. The opinion of the Circuit Court of Appeals (R. 13-14) is reported in 36 Fed. (2) 49.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on November 22, 1929 (R. 15). Petition for certiorari was filed February 21, 1930, and certiorari was granted on April 14, 1930 (R. 16). (281 U. S. 710.) The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The question presented is whether or not the days on which Federal income tax returns for 1920 and 1921 were filed are to be counted in the computation of the time within which assessments of deficiencies in tax for those years may be made. The Board of Tax Appeals excluded and the Circuit Court below included the days. Specifically, the question is: Where the returns for 1920 and 1921 were filed on March 15, 1921 and March 15, 1922, respectively, were assessments of deficiencies for those years made on March 15, 1926, late? This requires a construction of Section 277 (a) * * (2) and (3) of the Revenue Act of 1926.

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9, 58:

> Sec. 277(a) Except as provided in section 278—
>
> (1) The amount of income taxes imposed by this Act shall be assessed within three years after the re-

turn was filed and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(2) The amount of income, excess-profits and war-profits taxes imposed by the Revenue Act of 1921 and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Revenue Act of 1924, shall be assessed within four years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1928, c. 852, 45 Stat. 791, 856:

Sec. 275. *Period of Limitation upon Assessment and Collection.*

Except as provided in section 276—

(a) *General Rule.*—The amount of income taxes imposed by this title shall be assessed within two years

after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

Summary of Argument.

I. The language used in the statute requires the inclusion of the days on which the returns were filed in computing the limitation periods, for the reasons: (*a*) A literal construction of the word "within" means "in the limits of" or "on the inside of" the five (four) year period. (*b*) The purpose in adopting and the history of these limitation provisions indicate that Congress did not intend that they should be construed liberally in favor of the Commissioner. (*c*) To exclude the days on which the returns were filed in making the computations would exclude time which might have been utilized for the assessment of the deficiencies. (*d*) To exclude the days on which the returns were filed would be in conflict with the statement of this Court in *Florsheim Brothers Drygoods Company* v. *United States*, 280 U. S. 453, 460, that "the period of limitation should *begin on the date* when the return was filed" (italics ours).

II. If it is thought that there is any doubt in the meaning of the language, that doubt should be resolved in favor of the taxpayer and against the Commissioner, as uniformly held by this Court.

III. It is submitted that the various cases cited in Petitioner's brief as being in conflict with the decision below are unimportant for one or more of the reasons: (*a*)

None of them construe the limitation provisions here involved. (*b*) They are decisions calculated to reach an equitable result, whereas an equitable construction is not admissible in a taxing statute. (*c*) They are based on a literal construction of the language used. (*d*) They do not establish a general rule, binding on this Court, which can prevent the literal interpretation of the present statute or which can affect the application of the rule of resolving doubt in favor of the taxpayer.

Argument.

I.

It is well settled that unambiguous terms in a statute must be construed literally, unless such literal construction shocks the general moral or common sense.

The Supreme Court has recognized the applicability of this rule to the determination of these time cases. In *Dutcher* v. *Wright*, 94 U. S. 553, 561, it said:

> "Due weight in every case should be given to the words of the phrase to be construed, and by so doing many of the reported cases otherwise seemingly inconsistent may be satisfactorily reconciled."

The rule applies particularly in the interpretation of taxing statutes. *Crooks, Collector* v. *Harrelson, et al.*, 51 Sup. Ct. 49. Mr. Justice Sutherland there said (p. 51):

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the

> letter applies with peculiar strictness. In *United States* v. *Merriam*, 263 U. S. 179, 187, 188, 44 S. Ct. 69, 71, 68 L. Ed. 240, 29 A. L. R. 1547, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in *Partington* v. *Attorney-General*, L. R. 4 H. L. 100, 122, that 'if the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.' "

Section 277 (*a*) * * (2) and (3) requires the assessment of the tax "*within* five (four) years after the return was filed" (italics ours). The word "within" is thus defined in Webster's New International Dictionary:

> "In the inner or interior part of; inside of; not without; in the limits or compass of; not further in length than; inside the limits of; not going outside of; not beyond."

Therefore, if the statute is literally interpreted, any assessment which is made one moment after the expiration of five years from the moment the return was filed is not "within" five years after the filing of the return. It would seem that any workable rule must disregard fractions of days. Hence, the only possible rule which can be adopted,

under a literal interpretation of the statute, is to include the day the return was filed. To exclude that day would permit assessments not "within" five (four) years after the return was filed, contrary to the specifically expressed intention of Congress.

Prior to the Revenue Act of 1918, there was no limitation upon the time in which the Government could sue to recover taxes. A limited period for the assessment and collection of deficiencies was established in order that taxpayers might have repose. With the successive Revenue Acts the time was steadily decreased from five to two years.* Considering the purpose of these provisions and their history, it is respectfully submitted that an interpretation which would exclude the day of filing the return would be a liberal interpretation favorable to the Commissioner, and that it would be in direct conflict with the legislative intent. Where a literal interpretation would be in harmony with that intent, no good reason is perceived why it should be rejected. In *Griffith, et al.* v. *Bogert, et al.*, 18 How. 158, 163, a *terminus a quo* case, the Court said:

> "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. * * * The intention and policy of the enactment should be sought for and carried out."

The days on which the returns were filed might have been used for the purpose of assessing the deficiencies as

* See Statutes, Petitioner's Brief, pp. 2, 3; Statutes, this Brief, pp. 2-4; Revenue Act of 1924, c. 234, Section 277, 43 Stat. 253, 299.

effectually as any other days during the limitation periods. Manifestly, an assessment of a deficiency made on the day a return is filed would be a valid assessment. Therefore, to eliminate that day in the computation of the limitation period would necessarily result in the enlargement of the time within which deficiencies might have been assessed, and would, by construction, extend the taxing period beyond the clear import of the language used in the statute. See *Crooks* v. *Harrelson, supra.* This Court has recognized the soundness of such reasoning in deciding these time cases. *Taylor* v. *Brown*, 147 U. S. 640, 646; *Griffith, et al.* v. *Bogert, et al., supra*, p. 163.

For these reasons, it is submitted that the decisions which Petitioner has sought to distinguish from the present case on the ground of "obvious intent" (see Petitioner's brief, pp. 7, 8) are more nearly in point than those decisions upon which Petitioner relies.

In *Florsheim Brothers Drygoods Company* v. *United States*, 280 U. S. 453, this Court considered whether or not a so-called tentative return would start the running of the statute of limitations on additional assessments, and, if not, whether or not certain assessments had been made in time, measuring the period on the basis of the final returns. Holding that the final returns started the statute running and that the assessments were in time, Mr. Justice Brandeis said (p. 460):

> "And, in providing that the period of limitation should *begin on the date* when the return was filed, rather than when it was due, the statute plainly manifested a purpose that the period was to commence only when the taxpayer had supplied this information in the prescribed manner." (Italics ours)

II.

It is well settled that doubtful language in taxing statutes, *including limitation sections embodied therein,* must be construed liberally in favor of the taxpayer. In *United States* v. *Updike*, 281 U. S. 489, 496, the Court said:

> "In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing statutes, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349, 47 S. Ct. 389, 71 L. Ed. 676."

See also *Russell* v. *United States*, 278 U. S. 181.

Petitioner's brief does not mention that the court below based its decision largely upon this rule, and proceeds on the assumption that the Circuit Court decided the case solely on the distinction between measurement from a date and from an event. A reading of the opinion below shows that the court considered such a distinction, at most, only an *additional* reason for its conclusion. Reference to the distinction was made primarily, it is believed, to prevent the impression that the court had reversed its earlier decision in *New York Life Ins. Co.* v. *Bullock, et al.*, 26 Fed. (2) 666.

Therefore, if this Court should find there is doubt in the language used in the instant statute, it is submitted that the rule of resolving doubt in favor of the taxpayer requires the inclusion of the day of filing.

III.

Petitioner's brief (p. 6) states that the decision below is in conflict with the decisions of other courts "construing similar statutes". Respondent disputes this. It is submitted that the cases relied upon by Petitioner are either unimportant or distinguishable for one or more of the following reasons.

None of them involved the instant statute.

Only two, *Eliot National Bank* v. *Gill*, 218 Fed. 600 (C. C. A. 1), affg. 210 Fed. 933, and *Chambers* v. *Lucas*, 41 Fed. (2) 299 (Ct. App., D. C.), construed Federal taxing statutes. Those which did not deal with Federal taxing statutes could not be affected by the principle of interpretation in favor of the taxpayer. The opinions reveal that, the language construed being doubtful, the courts adopted that view which would prevent forfeitures, avoid hardship or preserve rights. As stated in *Crooks* v. *Harrelson, supra*, such considerations have no materiality whatever in the interpretation of Federal taxing statutes. The rule for resolving doubt in Federal taxing statutes is *construction in favor of the taxpayer*. For like reasons, it is submitted that the State court cases cited by Petitioner are unimportant.

Neither *Eliot National Bank* v. *Gill, supra*, nor *Chambers* v. *Lucas, supra*, were *decisions* supporting Petitioner. The statements of the courts that the *terminus a quo* should be excluded were not necessary to the conclusions reached.

Many of Petitioner's citations can be explained on the ground of literal construction. This Court has recognized

that literal construction is a sound basis for deciding these time cases. *Dutcher* v. *Wright, supra*, p. 561. The distinction drawn by many courts [*Arnold, et al.* v. *U. S.*, 9 Cranch 104, 120, 3 L. Ed. 671; *Zimmerman* v. *U. S.*, 277 Fed. 965 (C. C. A. 7); *N. Y. Life Ins. Co.* v. *Bullock*, 26 Fed. (2) 666, 667 (C. C. A. 5); *Board of Commissioners* v. *Vandriss*, 115 Fed. 866, 871 (C. C. A. 8); *Leeper* v. *Lemon G. Neely Co.*, 293 Fed. 967, 970 (C. C. A. 6)] between measurement from a date and from an event is recognition of the rule of literal construction. On the ground alone that they involved measurement from a date the following citations of Petitioner can be distinguished: *Sheets* v. *Selden's Lessee*, 2 Wall. 177; *Hicks* v. *National Life Ins. Co.*, 60 Fed. 690 (C. C. A. 2); *Supreme Council American Legion of Honor* v. *Gootee*, 89 Fed. 941 (C. C. A. 4); *Eliot National Bank* v. *Gill, supra*; *U. S.* v. *Senecal*, 36 Fed. (2) 388 (D. C., D. Mass.).

In *Dutcher* v. *Wright, supra*, *In re Hamilton*, 29 Fed. (2) 281 (C. C. A. 7), and *Bell* v. *West*, 44 Fed. (2) 161, the Federal Bankruptcy Act was involved. A section of that Act provides for the exclusion of the first and inclusion of the last day.

Petitioner's citations do not establish a general rule [*Taylor* v. *Brown, supra*; *Griffith, et al.* v. *Bogert, et al., supra*; *Owensboro* v. *Owensboro Water Works Co.*, 243 U. S. 166; *Arnold* v. *U. S., supra*; *Leidigh Carriage Co., et al.* v. *Stengel, et al.*, 95 Fed. 637 (C. C. A. 6); *Board of Commissioners* v. *Vandriss, supra*; *In re Puglisi*, 230 Fed. 188 (D. C., E. D. Pa.); *Dutcher* v. *Wright, supra*]. There is no reason, therefore, why this Court cannot literally

interpret the language of the instant statute or apply the rule of resolving doubt in favor of the taxpayer.

It would seem sufficient answer to Petitioner's "anomalous situation" argument (Petitioner's brief, pp. 8-9) that the applicable statute is Section *277(a)* * * (*2*) and (3) of the Revenue Act of *1926*, the wording of which does not permit the possibility of any such "anomalous situation" as he suggests. The Revenue Act of 1924 first adopted the phraseology which appears in the 1926 Act (and which was carried over into the 1928 Act). It may well be that Congress, aware of the very situation which Petitioner suggests, sought to remedy it.

Conclusion.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

J. C. MURPHY,
JOSEPH M. HARTFIELD,
Counsel for Respondent.

January, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 53.—October Term, 1930.

David Burnet, Commissioner of Internal Revenue, Petitioner, *vs.* Willingham Loan and Trust Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 26, 1931.]

Mr. Justice Holmes delivered the opinion of the Court.

This case came before the Circuit Court of Appeals upon a short question. Returns for taxes for the fiscal year 1920 and the fiscal year 1921 were filed respectively on March 15, 1921 and March 15, 1922. Assessments for both years were made on March 15, 1926. The question is whether the assessments were too late under the statutes by which they were governed. The earlier one fell under the Revenue Act of 1918, c. 18, § 250 (d), 40 Stat. 1057, 1083, which requires the amount of tax due to be assessed "within five years after the return was due or was made". That for 1921 was governed by Revenue Act of 1921, c. 136, § 250 (d), 42 Stat. 227, 265, which requires the assessment to be 'within four years after the return was filed." Both acts are affirmed in Revenue Act of (February 26,) 1926, c. 27, § 277, (a) (2) (3), 44 Stat. 9, 58. The Circuit Court of Appeals held that the assessments were too late. 36 F. (2d) 49. A writ of certiorari was granted by this Court. 281 U. S. 710.

The argument that prevailed with the Circuit Court of Appeals and that is pressed for the respondent is that a taxpayer is entitled to the most favorable construction of taxing acts, that there is a distinction between a limitation running from a day and one from an event, and that if the words quoted are taken literally the part of the day after the return was filed must be part of the four or five years. We are seeking a measure of time, and therefore we have to translate the event into the language of time; and when, as here, there is no special reason for being more precise, the day is the unit, because people generally measure periods of more than one day

by days, months or years. When we say 'four years after the return was filed' by common usage we think of four years after the day on which the return was filed and it would seem that Congress was following common usage. The earlier act read 'after the return was due or was made'. The return was not due before the end of the day for filing. By § 250 (d) of the Revenue Acts of 1918 and 1921 no suits shall be begun "after the expiration of five years after the date when such return was filed", obviously treating the 'date' and the filing as marking the same starting point, and 'date' equally plainly meaning the year and day of the month. The general rule was laid down long ago in language quoted from Chief Justice Bronson, *Cornell* v. *Moulton*, 3 Denio 12, "When the period for doing an act is to be reckoned from the making of a contract, or the happening of any other event, the day on which the event happened may be regarded as an entirety, or a point of time; and so may be excluded from the computation." *Sheets* v. *Selden*, 2 Wall. 177. *Owensboro* v. *Owensboro Water Works Co.*, 243 U. S. 166, 171. *Bemis* v. *Leonard*, 118 Mass. 502, and many more cases. The fiction that a day has no parts is a figurative recognition of the fact that people do not trouble themselves without reason about a nicer division of time.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.